> [W]hile regulatory parity is a significant policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the [1993 Budget] Act. Indeed, . . . Congress recognized that market conditions might warrant differential regulatory treatment of CMRS . . . .[62]

In recognition of legitimate differences among CMRS providers, in several instances the Commission has proposed treating cellular carriers differently than PCS providers, or even treating some cellular carriers differently than other cellular carriers.[63]

Indeed, since the release of the Sixth Circuit remand decision, Congress itself has recognized the difference between BOC provision of cellular and BOC provision of PCS. While liberalizing the cellular separate subsidiary requirement (by permitting joint marketing and resale) in the 1996 Act, Congress did not remove the requirement altogether.[64] In contrast, Congress imposed no separate affiliate requirement on BOC provision of PCS, including interLATA CMRS.

Third CMRS Report, 9 FCC Rcd 7988, 8036 ¶ 80 (1994)("The statutory language indicates that the Commission is not compelled to modify existing rules if such modification is unnecessary to achieve regulatory symmetry or is otherwise impractical."); id. at 8160 ¶ 392 ("We have stated throughout this proceeding that regulatory symmetry requires the elimination of inconsistent regulatory requirements applicable to CMRS services whenever practical.")(emphasis added).

[62] California Cellular Rate Order, 10 FCC Rcd 7486, 7490-91 ¶ 9 (1995)(internal citations omitted). *See also* ibid., *quoting* the 1993 Conference Report, which provided that "[t]he purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of [CMRS]. While this provision does not alter the treatment of all [CMRS providers] as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier."

[63] For example, until the new Act mooted the issue, the Commission proposed to impose equal access obligations on cellular carriers, but not on PCS providers. *See* CMRS Equal Access NPRM, 9 FCC Rcd 5408, 5429-32 ¶¶ 44-49 (1994). The Commission likewise refused to impose a separate subsidiary requirement on AT&T's provision of cellular service, notwithstanding the imposition of such a rule on the BOCs with their smaller cellular carriers. *See* AT&T/McCaw Transfer Order, 9 FCC Rcd 5836, 5904 ¶ 124 (1994), *aff'd,* 56 F.3d 1484 (D.C. Cir. 1995), *on recon.,* 10 FCC Rcd 11786 (1995).

[64] *See* Section 601(d) of the new Act and Notice at 28-32 ¶¶ 61-68.

This Congressional distinction in regulatory treatment between cellular and PCS likely reflects the fact that, as this Commission has observed, the broadband CMRS market "is in transition with the continuing introduction of PCS and the transformation of SMR":

> [Today], each geographic market has only two licensed cellular carriers, and in most markets these carriers do not yet face competition from any other facilities-based provider capable of offering reasonably substitutable services to a substantial majority of cellular customers. . . . . Until this situation changes, we remain concerned that cellular carriers have market power sufficient to enable them to impose unreasonable restrictions upon resale, and thus to stifle the competition that resellers can provide.[65]

Indeed, only three months ago, the Commission determined that the broadband CMRS market, consisting of two cellular carriers and one enhanced SMR provider, is currently "highly concentrated" because its Herfindahl-Hirschman Index ("HHI") exceeds 3700 (and is 5000 in markets without an enhanced SMR provider).[66] The HHI index for this market will fall dramatically (to between 1343 and 1898) once new PCS systems become operational.[67]

As the Commission correctly notes, the real question is "whether there are differences between cellular and PCS that justify different regulatory treatment, at least in the

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[65] CMRS Resale First Report, Docket 95-54, FCC 96-263, at 11 ¶ 17 (July 12, 1996). *See also* PCS Memorandum Opinion and Order, 9 FCC Rcd 4957, 5011 at ¶ 136 (1994)("We remain concerned about the potential for cellular operators to exercise market power and to reduce the number of viable competitors in the PCS market."); Landline SMR Eligibility NPRM, 9 FCC Rcd 4405, 4411 n.77 (1994)("Cellular operators, unlike other mobile services providers, may have the incentive and the potential to exercise market power to subvert PCS competition within their service areas.").

[66] CMRS Spectrum Cap Order, WT Docket No. 96-59, FCC 96-278, at 46-48 ¶¶ 96-98 and Appendix A (June 24, 1996).

[67] Ibid.

short term."[68] The Notice itself answers this question: "PCS players face competitive hurdles unlike those when the cellular service was established."[69] Moreover, once operational, PCS entrants face well-established, experienced incumbents in the broadband CMRS market:

> [A]s new entrants, such as broadband PCS providers, begin to seek customers, they will be competing directly with cellular firms that in many instances have been in the market for a decade or more. The advantages such incumbency conveys are well understood.[70]

There is, therefore, a factual basis for treating cellular differently than PCS — at least until PCS systems become operational.[71]

It finally bears noting that the cellular separate subsidiary rule reviewed by the Sixth Circuit is different than the rule in effect today. The rule considered by the Sixth Circuit precluded even BOC resale of cellular service, and the court was understandably concerned by the inability of Bell cellular licensees from offering "one-stop shopping"

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[68] Notice at 50 ¶ 108. *See also* Cincinnati Bell, 69 F.3d at 768, where the court asked the Commission to explain "what difference between the two [cellular and PCS] services justifies keeping the structural separation rule intact for Bell Cellular providers."

[69] Ibid. The Commission has noted that "[c]ellular companies already hold licenses for 25 MHz of clear spectrum, and they already have technical expertise, customers bases, marketing operations, and antenna and transmitter sites. In short, cellular operators have a competitive position that is superior to that of any new market entrant." CMRS Spectrum Cap Order, WT Docket No. 96-59, FCC 96-278, at 50 ¶ 101 (June 24, 1996). *See also* id. at 48 ¶ 99 ("[W]hile new entrants can de-concentrate many businesses, CMRS markets have significant barriers to entry, most notably the need for spectrum, the expense of obtaining the license and the high costs of construction and operation of new communications systems.").

[70] CMRS Resale First Report, Docket 95-54, FCC 96-263, at 11 ¶ 17 (July 12, 1996).

[71] While the Commission can conclude that there is a temporary factual difference in market position between cellular carriers, on the one hand, and PCS providers on the other hand, the cellular separate subsidiary rule still raises the difficult issue of treating some cellular carriers differently than other cellular carriers.

arrangements to consumers.[72] Congress has now removed the restriction on joint marketing and resale (and, as a result, on "one-stop shopping"),[73] and the Commission has already eliminated application of the rule altogether for "out-of-region" activities.[74]

IV. THE NEW CPNI STATUTE SHOULD BE INTERPRETED CONSISTENT WITH CONSUMER EXPECTATIONS AND ROBUST "FULL SERVICES" COMPETITION

The Commission seeks comment on how it should interpret the new "Privacy of Customer Information" statute, Section 222.[75] As demonstrated below, the answers to the questions posed in the Notice differ depending upon whether the Commission adopts the most natural reading of Section 222 or the interpretation the Common Carrier Bureau has proposed in another pending proceeding.[76]

A. The Most Natural Reading of Section 222

Section 222 is revolutionary. In the telecommunications industry, privacy protections historically have been afforded only to consumers of certain carriers — namely, AT&T, GTE, and the BOCs. Section 222 for the first time extends privacy protections to

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[72] *See* Cincinnati Bell, 69 F.3d at 767.

[73] *See* Section 601(d) of the Telecommunications Act of 1996.

[74] *See* Notice at 30 ¶ 64.

[75] *See* Notice at 56 ¶ 121. The Sixth Circuit noted these changes in its recent order denying BellSouth's motion to vacate the cellular separate subsidiary rule. *See* BellSouth v. FCC, Nos. 94-4113 and 95-3315 (6th Cir., Oct. 1, 1996).

[76] *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (May 17, 1996)("Section 222 NPRM").

all consumers — regardless of the carrier which happens to serve a consumer at any given point in time. Section 222(a) specifies that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers . . . ."[77]

Section 222 distinguishes between a carrier's internal use of "individually identifiable" CPNI and its ability to sell or provide this CPNI to others, reflecting a Congressional determination that consumers have different privacy expectations when a service provider they choose uses their information internally as opposed to third-party use of that information. Specifically, Section 222(c)(2) appears to prohibit a carrier from disclosing a customer's CPNI to "any person" without first obtaining the customer's written consent — unless one of the exceptions in Section 222(d) applies. On the other hand, Section 222(c)(1) permits a carrier to use its customers' CPNI, without first securing customer approval, "in the provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service."

[77] As enacted, Section 222 is radically different from both the initial Senate and House bills. The Senate bill (proposed section 252(f) of S.652) would have essentially preserved the *status quo* by applying CPNI obligations to the BOCs only. The House bill (proposed section 222 of H.R.1555) would have extended CPNI obligations to all providers of local exchange service, but would have authorized this Commission to exempt any such provider serving fewer than 500,000 lines. The statute ultimately enacted thus differs in two respects from the earlier bills: (1) CPNI privacy obligations now extend to all carriers; and (2) the Commission is not given the authority to apply different levels of CPNI protection to different carriers or classes of carriers. Given the radical differences between Section 222 as enacted and the House and Senate bills, the Commission should not place much weight on statements contained in the House or Senate reports accompanying the early bills. *See, e.g.,* Section 222 NPRM at 13 n.60.

The singular term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public."[78] The term "telecommunications," in turn, is defined as "the transmission between or among points specified by the user, of information of the user's choosing."[79] The Commission has already noted that Congress has defined the term telecommunications service "broadly to include all services that the Commission has classified as 'basic' services."[80]

The most natural reading of Section 222(c)(1), then, is that a carrier may use "individually identifiable" CPNI in the marketing and sale of the entire package of telecommunications services that it offers. This is because all components of a carrier's package of services are part of "the offering of telecommunications for a fee." Similarly, the plain language of Section 222(c)(1)(b) permits a carrier to use its "individually identifiable" CPNI with any other product or service "used in the provision of such telecommunications services." This would surely include both CPE (*e.g.*, CMRS handsets, caller ID boxes) and information services (*e.g.*, voice mail) because both are "used in the provision of" a telecommunications service.

This interpretation is consistent with Congressional intent. Congress has recognized that consumers "rightfully expect that when they are dealing with the carrier concerning their telecommunications services, the carrier's employees will have available all

[78] 47 U.S.C. § 153(46).

[79] 47 U.S.C. § 153(43).

[80] Section 222 NPRM, at 11 ¶ 20 (emphasis added).

relevant information about their service."[81] This customer expectation cannot be satisfied if government regulations preclude a carrier from using all relevant information about its customers in developing — and then marketing — innovative new service packages for those customers. Among other things, the statute permits carriers to use CPNI they obtain for target marketing purposes such as outbound telemarketing and direct mail.

This interpretation is also consistent with the Commission's recognition that consumers desire the convenience of "one-stop shopping."[82] As the Commission stated recently, "'one-stop shopping' promotes efficiency and avoids consumer confusion":

> We believe that the benefits to consumers of "one-stop shopping" are substantial . . . . The ability of a customer, especially a customer who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company.[83]

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[81] H.R. Rep. No. 104-205, 104th Cong., 1st Sess., at 90 (July 25, 1995)(emphasis added). Consumers have minimal privacy expectations when a carrier they choose uses their information to develop new service packages which they may find attractive. Privacy expectations are addressed by Section 222(c)(2), which prohibits a carrier from disclosing a customer's CPNI to "any person" without first obtaining the customer's written consent.

[82] The Commission has defined "one-stop shopping" as "the ability of a customer to have one point of contact with a carrier at which the customer may inquire, and the carrier may provide, information about exchange service and other telecommunications products and services available from that carrier. In contrast, if structural separation or limits on disclosure of CPNI among affiliates are in place, the customer would have to contact each separate subsidiary or operating division individually to obtain information about the products and services offered by the subsidiary or division contacted." AT&T/McCaw Transfer Reconsideration Order, 10 FCC Rcd 11786, 11789 n.16 (1995).

[83] AT&T/McCaw Transfer Reconsideration Order, 10 FCC Rcd 11786, 11795-96 ¶¶ 15 and 16 (1995). Indeed, the Commission specifically refused to prohibit AT&T from using its "interexchange CPNI" in selling cellular services "because such a prohibition would undercut one of the benefits of the AT&T/McCaw combination: the ability of AT&T/McCaw to offer its customers the ability to engage in 'one-stop shopping' for their telecommunications needs." AT&T/McCaw Transfer Order, 9 FCC Rcd 5836, 5885-86 ¶ 83 (1994).

"One-stop shopping" is more than a mere convenience to consumers; it affirmatively promotes competition by facilitating both consumer choice and lower prices. As the D.C. Circuit held only last year, "We agree with the Commission . . . that AT&T/McCaw's ability to market its service directly to the customers of other . . . carriers should lead to lower prices and improved service offerings. . . . [W]e do not see why that is contrary to the public interest. . . . [T]he intensified price and service competition that follows is likely to draw more customers into the . . . market — a clear public benefit."[84]

"One-stop shopping," of course, requires a carrier to offer an integrated package of services. But it also requires a carrier to use its customers' CPNI fully, so it can develop and market a package of services uniquely suited to individual customers' needs. Less than one year ago, this Commission "decline[d] to limit consumer choice and efficiency by barring AT&T from sharing its customers' CPNI, obtained through the provision of long-distance service, with its cellular affiliates."[85] U S WEST agreed with this Commission decision then, and it agrees with the decision now. More importantly, in

[84] SBC Communications v. FCC, 56 F.3d 1484, 1495 (D.C. Cir. 1995). The Commission, too, held that "permitting AT&T to disclose the information at issue to its cellular affiliates will increase competition for cellular customers as those affiliates, BOC cellular affiliates, and other providers seek to improve service and/or lower prices to attract and retain customers." AT&T/McCaw Transfer Reconsideration Order, 10 FCC Rcd at 11792 ¶ 9. *See also* Catline v. Washington Energy Co., 491 F.2d 1343 (9th Cir. 1986)(recognizing benefits of vertical integration and internal information sharing).

[85] AT&T/McCaw Transfer Reconsideration Order, 10 FCC Rcd at 11794 ¶ 12.

enacting Section 222, Congress clearly endorsed this pro-consumer approach as well. In Congress' own words, this is precisely what consumers "rightfully expect."[86]

With this background, the answers to the Section 222 questions posed by the Commission become relatively straightforward.[87] For example, the Commission asks whether cellular and PCS should be considered the same service such that CPNI gained in the provision of one service could be utilized without restriction in the marketing of the other service.[88] It similarly asks whether narrowband CMRS services (like paging) and CMRS toll services should be considered to be the same service as broadband CMRS.[89]

Under the most natural reading of Section 222, all these services — broadband CMRS, narrowband CMRS, CMRS toll — are all part of an overall "offering of telecommunications" designed to meet a customer's telecommunications needs. Indeed, under this interpretation of Section 222, a carrier could use CPNI acquired in the provision of a CMRS service in the marketing of landline local or toll service (and *vice versa*). Whether a specific service is classified by regulators as local or toll, landline or wireless,

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[86] H.R. Rep. No. 104-205, 104th Cong., 1st Sess., at 90 (July 25, 1995).

[87] The Commission also asks whether it should impose unspecified new "organizational and procedural guidelines" on BOC provision of PCS. Notice at 56 ¶ 121. As noted above (*see* note 77 *supra*), Section 222 does not permit this Commission to apply different CPNI rules to different carriers, Congress having expressly rejected this approach in favor of applying privacy obligations to "every telecommunications carrier." Besides, even if it had the authority to impose different CPNI obligations on one or more classes of carriers, the Commission is proposing to regulate the wrong group of carriers. Unlike BOCs, which were subject to CPNI obligations before the 1996 Act and which have already developed extensive procedures to protect their customers' privacy expectations, non-BOC carriers have not been compelled to develop any CPNI procedures. Consequently, it would appear that, if anything, special "organizational and procedural guidelines" would most appropriately be imposed on carriers other than BOCs.

[88] *See* Notice at 56 ¶ 121.

[89] *See* ibid.

narrowband or broadband, the fact is that all these services may be part of a carrier's overall "offering of telecommunications" designed to meet the overall telecommunications needs of businesses and consumers.

B. The Common Carrier Bureau's Proposed Interpretation of Section 222

The Common Carrier Bureau ("CCB") has recently proposed a very different interpretation of Section 222.[90] Under the CCB's proposal, the term "telecommunications service" in Section 222(c)(1) would be defined to encompass three discrete categories of services: landline local (including short-haul toll); landline toll (including short-haul toll); and CMRS. According to the CCB, CPNI acquired in the provision of one category (*e.g.*, CMRS) could not be used by a carrier in the marketing of another category of services (*e.g.*, landline local or toll) — without first securing the customer's permission.[91]

The CCB's "three-distinct-service-categories" proposal rests on a number of assumptions which U S WEST questions, as discussed below. Fundamentally, however, the CCB's proposal would wreak havoc on a carrier's ability to offer the very "one-stop shopping" that the Commission has recognized meets customer expectations and leads to lower prices.[92] The proposal would also inhibit all carriers from applying efficiencies of

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[90] *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (May 17, 1996)("Section 222 NPRM").

[91] *See* Section 222 NPRM at 13 ¶ 23 ("CPNI obtained from providing any one of the discrete services . . . may not be used for any purpose, including marketing, involving any of the other services, unless the telecommunications carrier obtained prior customer authorization . . . .").

[92] It bears repeating that Section 222 is titled "Privacy of Customer Information," and while consumers have considerably privacy expectations concerning firms sharing their CPNI with others, they do not have

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scope as they expand into new markets — at the very time Congress has removed all legal and regulatory entry barriers in the expectation that all telecommunications markets would become more competitive.

The Commission has recently encouraged carriers in one submarket to enter adjacent submarkets, and in the 1996 Act Congress also took steps to facilitate all carriers becoming "full-services" carriers so consumer options would be maximized. For example, only three months before the new Act became effective, this Commission confirmed that an IXC could use its "interexchange CPNI" in the marketing of CMRS services (and *vice versa*), noting the benefit consumers would realize from this "one-stop shopping."[93] However, the CCB's proposal would now reverse this decision by precluding an IXC from using its "interexchange CPNI" in the marketing of either landline local or CMRS services (because, in the CCB's preliminary judgment, CMRS and toll are different services). Similarly, in removing the in-region interLATA prohibition on the BOCs (after checklist compliance), Congress further expects the market for interexchange services to become more competitive. However, the CCB's proposal would hamper the BOCs from

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privacy concerns about a carrier they choose from using their CPNI fully to develop new services packages which they may find useful.

[93] AT&T/McCaw Transfer Reconsideration Order, 10 FCC Rcd 11786, 11795-96 ¶ 15 (1995)(A "customer who contacts AT&T/McCaw about interexchange service, even for use with a BOC's cellular service, should not be barred from obtaining, at the same time and place, information about CPE, enhanced services, or cellular service that AT&T/McCaw could also offer the customer."). Indeed, the Commission specifically refused to prohibit AT&T from using its "interexchange CPNI" in selling cellular services "because such a prohibition would undercut one of the benefits of the AT&T/McCaw combination: the ability of AT&T/McCaw to offer its customers the ability to engage in 'one-stop shopping' for their telecommunications needs." AT&T/McCaw Transfer Order, 9 FCC Rcd 5836, 5886 ¶ 83 (1994).

entering the interexchange market by prohibiting them from using their "local CPNI" in selling their new long distance services.

Similarly, the Commission has encouraged CMRS providers to enter the landline local telecommunications submarket as a means to stimulate additional consumer choices in the landline local submarket.[94] It has also authorized CMRS providers (including LECs) to provide services through "fixed wireless loops."[95] Under the CCB's proposal, a CMRS provider installing landline facilities could not use its "CMRS CPNI" in selling its landline local services; a LEC with CMRS spectrum would be unable to use its "landline local CPNI" in the sale of "wireless loops" (even though they are used instead of landline loops); and a CMRS carrier offering "fixed wireless loops" may not even be able to use its "mobile CMRS CPNI" in selling its "fixed CMRS" services.

In a similar vein, Congress has now permitted the BOCs to resell cellular service with their landline services. As the Commission has acknowledged, Section 601(d) permits a BOC to provide "at a single point of contact, . . . the CMRS, telephone exchange service, exchange access, intraLATA and interLATA telecommunications and information services provided by the BOC."[96] The CCB's proposal, however, would effectively preclude a BOC from engaging in the very activity Congress has permitted in Section 601(d).

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[94] *See, e.g.,* Ameritech Section 22.903 Waiver Order, CWD 95-14, FCC 96-339 (Aug. 22, 1996); SBMS Section 22.903 Waiver Order, 11 FCC Rcd 3386 (1995).

[95] *See* CMRS Flexible Use Order, 11 FCC Rcd 8965,8966 ¶ 1 (1996).

[96] Notice at 30 ¶ 64.

Even stand-alone CMRS providers would be impacted negatively by the CCB's proposal. While the CCB's proposal would permit stand-alone providers to use their "CMRS CPNI" in the marketing of any local or toll CMRS service they provide, these carriers would still be prohibited from using their "CMRS CPNI" in the sale or rental of handsets and the sale of enhanced services (*e.g.*, voice messaging)[97] — even though the Commission has determined that the bundling of CMRS service and handsets actively promotes the public interest.[98]

U S WEST does not believe the CCB's proposal is the correct interpretation of the statute.[99] The CCB's "three-distinct-services" proposal rests upon several questionable assumptions. Most fundamentally, the CCB assumes that Congress said "telecommunications service," but actually meant subsets of telecommunications services. This assumption cannot be squared with the Commission's own acknowledgment that Congress has defined the term "telecommunications service" "broadly to include all services that the Commission has classified as 'basic' services."[100] This assumption also cannot be

[97] Under the CCB's current proposal, carriers could not use "telecom services CPNI" in selling CPE or information services. *See* Section 222 NPRM at 13 ¶ 26 ("CPNI obtained from the provision of any telecommunications service may not be used in market information services or CPE without prior customer authorization."). In taking this position, the CCB never squares its proposal with Section 222(c)(1)(B).

[98] *See* Cellular CPE Bundling Order, 7 FCC Rcd 4028 (1992).

[99] *See* U S WEST Comments, Docket 96-115, at 4-7 (June 11, 1996).

[100] Section 222 NPRM at 11 ¶ 20 (emphasis added). The CCB appears to place considerable emphasis on the fact that the statute is written in the singular: "the telecommunication service." Id. at 11-12 ¶ 21. But, as the CCB itself acknowledges, Congress has broadly defined the singular term "telecommunica-tions service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153 (46)(emphasis added). The cable privacy statute is similarly written in the singular: "to render a cable service or other service provided by the cable operator." 47 U.S.C. § 631(b)(2)(A)(emphasis added). No one has ever suggested that, for CPNI purposes, the use of the singular requires a cable operator to divide

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squared with the fact that, unlike in other provisions of the 1996 Act, Congress in Section 222 made no attempt to distinguish among specific telecommunications services.

Moreover, the CCB's "three-distinct-service" proposal cannot be squared with either the plain language of the Act or the Commission's decisions applying the Act. For example, the CCB asserts that CMRS providers and LECs provide a different service when the Commission has already held that, under the Act, LECs and CMRS carriers provide the same "telephone exchange service."[101] It makes no sense, therefore, to preclude CMRS providers from using their "CMRS CPNI" in selling landline exchange service or to preclude LECs from using their "landline CPNI" in selling CMRS services.

Equally insupportable is the CCB's tentative decision that all CMRS services constitute one service under the Act. Again, the Commission has already held that broadband CMRS constitutes a different service under the Act than narrowband CMRS such as paging.[102] Consequently, if the CCB is correct that in using the term "telecommunications service" Congress actually intended to mean subsets of telecommunications

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its cable services into "traditional service" categories such as "basic tier," "expanded basic tier," and "premium tier." Similarly, Congress has defined the singular term "other service" to include "<u>any</u> wire or radio communications service." 47 U.S.C. § 631(a)(2)(B)(emphasis added). The same construction should apply to the term "the telecommunications service."

[101] *See* <u>Local Competition First Report</u> at 482-83 ¶¶ 1013-14 ("[W]e find that cellular, broadband PCS, and covered SMR providers fall within the second part of the [statutory telephone exchange services] definition because they provide 'comparable service' to telephone exchange service.").

[102] The Commission has determined that paging is neither a telephone exchange nor a telephone toll service. *See* <u>Local Competition Second Report</u>, Docket 96-98, FCC 96-333 at 141 ¶ 333 (Aug. 8, 1996) ("[P]aging carriers . . . are not providers of telephone exchange service or telephone toll service."). Under the CCB's "distinct-services" proposal, a broadband CMRS provider could not use its CPNI in selling a paging service (and *vice versa*) because, under the Act, narrowband and broadband CMRS services fall into two distinct categories of telecommunications services. Such a result, although dictated by the CCB's analysis, would defy customer expectations and current industry practice.

services, and if the Commission applies the subsets recognized in the Act, AT&T cannot effectively provide the innovative broadband/narrowband CMRS service it announced earlier this week.

Finally, even if the CCB is correct that Congress intended to use the term "telecommunications service" to mean the three categories of telecommunications services it identifies, the Bureau never explains why carriers could not still use CPNI acquired in one service (*e.g.,* landline local) in marketing a "different" service (*e.g.,* CMRS) pursuant to Section 222(c)(1)(B). That provision expressly permits a carrier to use its CPNI with any service or product "necessary to, or used in, the provision of such telecommunications service." Clearly, a CMRS service can be "used in" the provision of either a landline local service or a toll service (or *vice versa*).

The CCB's "three-distinct-telecommunications-services" proposal is, moreover, inconsistent with consumer expectations. As noted above, just last year Congress found that consumers "rightfully expect that when they are dealing with the carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about their service."[103] Consumers do not make the same fine distinctions among service categories often made by regulators and lawyers. Instead, consumers have a need — telecommunications — and they see all telecommunications services as potentially meeting this single need.[104]

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[103] H.R. Rep. No. 104-205, 104th Cong., 1st Sess., at 90 (July 25, 1995).

[104] The CCB has stated that its "distinct-services" proposal will "enhance customer privacy by giving cus-

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The CCB's "three-distinct-telecommunications-services" proposal is also inconsistent with the purpose of the 1996 Act. Congress enacted this Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[105] Among other things, Congress removed all barriers to entry so all providers can become "full-services" carriers, with the result that consumers will experience more choices (in the number of providers and service packages) and in lower prices.[106] These overriding Congressional purposes will be frustrated if Commission regulations prohibit "full-services" carriers from using all their customers' CPNI in developing new customer solutions. Handicapping carriers through restrictive government regulations is hardly consistent with a "pro-competitive, de-regulatory . . . policy framework."

The CCB's proposal would also undermine the regulatory parity principle underlying the 1996 Act. Congress has removed all entry barriers so cable TV companies can enter the telecommunications market and telecommunications carriers can enter the

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tomers greater control over CPNI uses." Section 222 NPRM at 13 ¶ 24. This undocumented assertion is inconsistent with both prior Commission determinations as well as ordinary experience. The fact is that consumers will be confused, if not outright angry, if in their dealings with their serving carrier the carrier appears ignorant about their service because government regulations preclude the carrier from having full access to the customer's total service file.

[105] Telecommunications Act of 1996, Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 113 (Jan. 31, 1996).

[106] As the Commission stated earlier this week, "the opening of the local exchange and exchange access markets to competition 'is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets." Classic Telephone Preemption Order, CCBPol 96-10, FCC 96-397, at 14 ¶ 25 (Oct. 1, 1996)(emphasis in original), *quoting* Local Competition First Report at ¶ 4.

video/entertainment market. The CCB's proposal would impose different, more stringent CPNI rules on telecommunications carriers as compared to cable companies and would, as a result, place telecommunications carriers at a competitive disadvantage *vis-à-vis* their cable TV competitors.[107]

The CCB has justified its "three-distinct-service" proposal by use of "traditional service distinctions."[108] U S WEST is surprised that the Commission is proposing to adopt rules for tomorrow based upon the classifications of yesterday. Whatever justification the CCB's proposed three categories may have had in the past,[109] they are no longer viable today. Indeed, even the CCB concedes that "in the rapidly evolving market for telecommunications services, the distinctions we propose here may become outdated."[110] With the enactment of the 1996 Act and the removal of all entry barriers, it should be anticipated that most carriers will now become exactly what Congress intended: "full services" carriers.

[107] The privacy statute applicable to cable TV companies is contained in Section 631(b)(2), which states that a cable operator may use personally identifiable subscriber information with respect to the rendering of "a cable service or other service provided by the cable operator to the subscriber." Section 631(a)(2)(B) defines the term "other service" to include "any wire or radio communication service provided using any of the facilities of a cable operator." Thus, a cable company may use its TV-generated CPNI to develop and sell any telecommunications service it provides while, under the CCB' proposal, telecommunications carriers would be able to use their CPNI only within three subsets of their telecommunications services.

[108] Section 222 NPRM at 12 ¶ 22.

[109] The "traditional service distinctions" were caused, not by technology or market demand, but by regulations. The Commission ensured that the CMRS industry would develop independently of the landline industry by adopting the cellular separate subsidiary requirement. The BOCs were precluded by the MFJ from entering the interexchange market. And state regulatory commissions had generally prohibited anyone but the incumbent LEC from providing landline local exchange service.

[110] Section 222 NPRM at 13 ¶ 23.

Therefore, the Commission should adopt the most natural interpretation of Section 222 by permitting any carrier to use its customers' CPNI in connection with any telecommunications service it provides and with any product or service used in the provision such services.

V. CONCLUSION

U S WEST's incumbent LEC developed business plans after the Commission established its "complete integration/accounting only" PCS rules three years ago. Its incumbent LEC has also begun to implement its business case (*e.g.*, participating in the current auction) in reliance on these rules. In these circumstances, it is imperative that the proponents of new safeguards have the heavy burden of establishing a clear need for them.

These comments document that there was no reason to impose additional safeguards for PCS before, and that there is certainly no reason to impose them now. It is questionable whether, with the enactment of the Telecommunications Act of 1996, the BOCs still possess power in the market for telephone exchange services. However, even if they still do, there is no realistic chance they could leverage that power into the CMRS market — much less sustain it. Unless the Commission affirmatively finds — based on a full and complete record — that both conditions exist in the light of current and future market conditions, it should not impose any safeguards on BOC provision of PCS.

For the foregoing reasons, the Commission should reject arguments to impose new "safeguards" with regard to LEC provision of PCS. The Commission may want to retain the recently liberalized cellular separate subsidiary rule — but only until PCS systems become operational and the CMRS market becomes much more competitive. Finally, the Commission should interpret the new CPNI statute consistent with its most natural reading and the clear Congressional intent.

Respectfully submitted,

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October 3, 1996

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 3rd day of October, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via hand-delivery upon the persons listed on the attached service list.

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